

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Petition of ACS of Anchorage, Inc. Pursuant to |) | |
| Section 10 of the Communications Act of 1934, as |) | WC Docket No. 05-281 |
| amended, for Forbearance from Sections 251(c)(3) |) | |
| and 252(d)(1) in the Anchorage LEC Study Area |) | |
| _____ |) | |

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)¹ submits its comments in response to the Federal Communications Commission’s (FCC’s or Commission’s) Public Notice² in which it seeks comment on a Petition for Forbearance filed by ACS of Anchorage (ACS).

INTRODUCTION AND SUMMARY

ACS seeks forbearance from the unbundling obligations of Section 251(c)(3) of the Communications Act of 1934, as amended (Act), as they apply to the Anchorage local exchange carrier study area,³ and from the related Section 252(d)(1) pricing standards for unbundled network elements (UNEs) to the extent ACS continues to offer UNEs in Anchorage.

¹ USTelecom is the nation’s leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom’s carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

² See Public Notice, Pleading Cycle Established for Comments on ACS’s Petition for Forbearance in the Anchorage, Alaska Local Exchange Carrier Study Area, WC Docket No. 05-281, DA 05-2709 (Oct. 14, 2005).

³ There is precedent for granting forbearance from section 251(c)(3) obligations where there is evidence of “substantial intermodal competition for telecommunications services provided over . . . [a competitor’s] own extensive facilities” See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, FCC 05-170, ¶ 59 (rel. Dec. 2, 2005) (Qwest Forbearance Order).

ACS offers detailed information about the stiff competition it faces in the Anchorage study area – competition from a facilities-based, switched local exchange service provider that uses its own cable, fiber, and copper facilities, as well as competition from wireless and Voice over Internet Protocol (VoIP) providers and a host of resellers. Importantly, particularly in light of the Commission’s Qwest Forbearance Order, ACS’s facilities-based competitor, GCI, “covers” the Anchorage study area because it “uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC’s local service offerings.”⁴ Moreover, and also consistent with the Commission’s findings in the Qwest Forbearance Order, GCI is capable of using its voice-enabled plant, which covers the Anchorage study area, to provide voice service to a meaningful percentage⁵ of the market within a commercially reasonable time from the date the customer requests service.⁶

This competition has resulted in a drastic reduction of ACS’s share of the local exchange market. ACS now has less than 50 percent of the local exchange market in the Anchorage study area. As significant as this market share reduction is, the Commission should not set a market share loss test for forbearance requests such as this. Rather, it is the existence of competitive

⁴ See Qwest Forbearance Order, fn. 156.

⁵ It is noteworthy that the Commission did not purport to establish a minimum number of competitive voice-enabled lines for determining what would be sufficient for forbearing from unbundling obligations, but rather the Commission states clearly each market must be analyzed based on its unique properties. See *id.*, ¶ 62. The Commission should remain cognizant of this as it considers the ACS Petition. In the matter before the Commission, GCI need not have precisely the same percentage of voice-enabled lines as Qwest’s competitor had in Omaha in order for the Commission to grant ACS’s requested forbearance. Factors such as GCI’s status as the incumbent cable operator in the Anchorage area should also be taken into account.

⁶ See *id.* For example, if merely a truck roll or some other minor work is necessary to initiate voice service, those lines should qualify the lines as “voice enabled” under the Qwest Forbearance Order.

substitutes – or the capability of competitors to deliver competitive services – that signals network unbundling requirements have become unnecessary and that warrant forbearance from network unbundling requirements. Hence, the section 10 requirements for granting forbearance were satisfied well before competitors captured more than 50 percent of the market. The highly competitive nature of the Anchorage market dictates that the Commission grant the requested forbearance and grant it quickly – not in 15 months, as is common with most petitions for forbearance – to ensure that competition continues to flourish in Anchorage.

What is happening in Anchorage is representative of the changed landscape for communications services. It is a new world in communications – one defined by vigorous competition among numerous companies investing in many different technologies to deliver new services and choices to consumers. Technology and the marketplace are consistently bringing consumers the benefits of many different full-service, competitive communications products by companies that are expanding their array of services. Cable service providers, information service providers, wireless service providers, and wireline carriers are more than their labels suggest. For example, cable providers offer telephone service; information service providers and other Internet-based providers such as Google, Microsoft, and Yahoo are also beginning to offer voice service; wireless providers can stream video and send e-mail; and wireline carriers are offering video service.

Consumers have every right to expect that the increased service offerings made available by diverse competitors over the past few years will be indicative of new service offerings by many different types of providers in the future. While it may not be clear now what new technologies and services will be available in the future, the competitive marketplace has demonstrated that the future of communications services is ever evolving and rapidly changing

and that, as the market for VoIP services has proved just in the last year, the future comes very quickly. The reward of competition promised in the Telecommunications Act of 1996 (1996 Act) has been realized.

Along with competition, the 1996 Act also promised deregulation. Indeed, competition replaces the need for many regulations.⁷ When substantial competition exists, there is no longer a need to impose regulations that were specifically intended to spur competition. It is time for the Commission to heed the demands of the competitive marketplace by eliminating unbundling and related pricing regulations and by allowing the market to operate freely. When there is vibrant competition, particularly such as that demonstrated in Anchorage, it is irresponsible to inhibit the continued growth of facilities-based competition and to provide some competitors with a cost advantage by imposing unnecessary regulations on other competitors.

DISCUSSION

I. Forbearance From Section 251(c)(3) And Section 252(d)(1) Obligations Will Spur Facilities-Based Competition.

ACS has demonstrated that its competitors do not need the protection of regulated access to UNEs or regulated rates of those UNEs. However, despite the lack of need for access to UNEs at discounted rates, at present ACS's competitors can use their access to ACS's UNES to their competitive advantage and they will continue to do so as long as there is a cost benefit of using UNEs instead of building their own facilities. Allowing ACS's competitors to continue to

⁷ While USTelecom advocates freedom from economic regulation, USTelecom continues to advocate that the Commission must preserve certain social priorities by imposing the same regulatory obligations on all providers of communications services. Specifically, the Commission must ensure that all providers of communications services make universal service contributions; that law enforcement has access to telecommunications networks; that all Americans have access to E911; that disabled citizens have the opportunity to use communications networks; that consumers are protected against slamming and improper use of their proprietary network information; and that access charges are applied even handedly.

rely on UNEs when they are not needed to provide competitive service does not spur further facilities-based competition; rather, it inhibits such competition.

More specifically, without forbearance, the “result of unbundling in this context is less competition than would otherwise exist – GCI gets mandatory access to ACS’s customers, but ACS does not get equivalent access to customers reached only by GCI. This asymmetric outcome is counterproductive to consumer welfare and to the goals of the 1996 Act.”⁸ Competition is also hindered by continuing to require ACS to comply with Sections 251(c)(3) and 252(d)(1) because GCI is less motivated that it otherwise would be without access to discounted unbundled network elements to deploy its own facilities. “GCI has stated publicly and has demonstrated that it would accelerate deployment of its own facilities upon an increase in the price of UNE loops.”⁹ Every day that the Commission delays action in granting ACS’s Petition is another day that complete facilities-based competition is delayed in Anchorage.

II. Forbearance From Sections 251(c)(3) and 252(d)(1) Is Essential To Ensure An Appropriate Competitive Marketplace.

The competitive marketplace in which carriers operate today, particularly the competitive market found in the Anchorage local exchange study area, necessitates that the Commission adapt its regulations to respond to such competition. ACS’s intermodal, facilities-based competitors are not subject to the same regulations to which ACS is subject. Similarly, other competitors such as VoIP providers are not subject to the stringent regulations to which ACS is subject.

⁸ ACS Petition for Forbearance, Exhibit D (Shelanski Statement), at 10.

⁹ *Id.* at 7.

The current situation in Anchorage disadvantages ACS because it is competing with carriers that operate fully in a market economy – *i.e.*, without requirements to share pieces of their networks and to share those pieces at discounted rates.¹⁰ Like its competitors, ACS must have a good business plan, aggressive marketing, reliable service, and competitive pricing. However, unlike its competitors, ACS must do all these things within the confines, and subject to the additional costs and administrative burdens, of regulations imposed on incumbent local exchange carriers.

Allowing ACS's competitors to continue to use its UNEs in a market where there is already robust facilities-based competition actually promotes distortion in the market. The continued imposition of unbundling regulations and related pricing standards provides ACS's competitors with an advantage that allows them to strengthen their position in the marketplace because they can win over customers by offering service using the network of their competitor and paying discounted rates for such access. This regulatory arbitrage severely hampers ACS's ability to compete. ACS is losing customers because it is forced to compete on an unequal footing.

The burdens imposed on ACS by unnecessary regulation when vibrant competition exists in Anchorage confer an unreasonable and unjustified advantage on ACS's competitors. Because the Anchorage market is fully competitive, the Commission should eliminate the regulatory burdens of Sections 251(c)(3) and 252(d)(1) that are placed on ACS.

¹⁰ The Commission has already noted that increasing regulatory parity in a market where there is a substantial amount of facilities-based competition is important and is a significant reason for finding that the public interest prong of section 10 forbearance has been met in a request for forbearance from section 251(c)(3) obligations. *See* Qwest Forbearance Order, ¶ 76.

III. The Presence Of Substantial Competition In The Anchorage Study Area Provides The Basis For Finding That The Requirements Of Section 10 Have Been Satisfied.

When markets are fully competitive, there is no need for regulation of prices. The market regulates prices. “[C]ompetitive pressure from GCI prevents ACS from profitably raising prices – the heart of market power.”¹¹

When markets are fully competitive, there is no need to regulate prices or access to services for the protection of consumers. Indeed, with regard to prices, “consumers throughout the Anchorage Study Area are well protected by GCI’s competitive strength because ACS’s retail rates must be consistent throughout the study area.”¹² In addition, with regard to services, consumers’ “demand for the services of either individual firm [*i.e.*, ACS or GCI] is elastic; in other words, consumers will substitute one carrier for the other in the event they are dissatisfied with price or quality of service.”¹³

Importantly, in a competitive market such as the one in Anchorage, the market will ensure that consumers’ demands are met. GCI’s success in the Anchorage market clearly demonstrates that it is able “to meet the demand of consumers seeking to substitute GCI’s service for ACS’s service” and that there is “elasticity of competitive supply in the Anchorage local exchange market.”¹⁴ When there is a market that will respond to unreasonable price increases or inadequate service offerings then regulations addressing these concerns are not necessary and forbearance from such regulations is not only appropriate but imperative to ensure that the already competitive market remains competitive.

¹¹ ACS Petition for Forbearance, Exhibit D (Shelanski Statement), at 6.

¹² *Id.* at 3.

¹³ *Id.* at 6.

¹⁴ *Id.*

As it did in the Qwest Forbearance Order, the Commission should find here that the competition for telecommunications services is sufficiently developed in the Anchorage study area so that it is no longer necessary to impose a section 251(c)(3) obligation on ACS to ensure that its charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.¹⁵ The requirements of section 10(a)(1) have been met.

In the Qwest Forbearance Order the Commission also relied on the competitive state of the Omaha MSA along with its imposition of a transition plan that provides competitors with six months to transition from UNEs to alternative facilities or arrangements in finding that the requirements of section 10(a)(2) had been met.¹⁶ To the extent the Commission feels it is necessary, there is nothing to prevent the Commission from imposing a brief transition period and thereafter eliminating UNE obligations for ACS in the Anchorage study area. In this case, however, a six-month period is unwarranted because GCI has already had ample time to transition from UNEs to its own facilities. Further, granting a six-month transition period could effectively vitiate any relief that is granted because at the end of that time period it is likely that GCI will have already relinquished all UNEs provided by ACS.¹⁷ An adequate transition period in this case, if necessary at all, should last no more than three months.

¹⁵ Qwest Forbearance Order, ¶ 63.

¹⁶ *Id.*, ¶¶ 73 and 74.

¹⁷ ACS cites to information already provided by GCI that it migrated 8,000 of its Anchorage customers onto its own facilities in 2004 and that it planned to migrate another 25,000 of its Anchorage customers onto its own facilities in 2005, accounting for an estimated one-third of its Anchorage customers. *See* ACS Petition for Forbearance at 14. ACS also notes that “GCI intends to accelerate this conversion over time, and accordingly to this schedule, GCI will have migrated virtually all of its customers to its own network by the end of 2007.” *Id.* If the Commission were to take the full year allowed it by statute, and worse if it took the additional three months permitted by extension, it would be the beginning of the fourth quarter 2007, or

The Commission also found in the Qwest Forbearance Order, based on a record of significant competition in the Omaha MSA, that the public interest would be served by eliminating Qwest's section 251(c)(3) obligations, noting that forbearance would "help promote market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b)."¹⁸ It also noted two other important reasons to find that the requirements of section 10(a)(3) had been met: (1) "the costs of unbundling obligations in parts of the Omaha MSA outweigh the benefits" and (2) forbearance from section 251(c)(3) "will increase the regulatory parity in this market."¹⁹ The same benefits would be reaped from forbearance of section 251(c)(3) and 252(d)(1) obligations currently imposed on ACS.

In Anchorage, the market can efficiently and effectively regulate prices and the elasticity of competitive supply and of consumer demand offers protection to consumers. Accordingly, in such a competitive market forbearance is in the public interest. More specifically, when there is substantial competition for service in a market, particularly as is the case in the Anchorage local exchange study area, the presence of such competition itself satisfies the requirements of Section 10 forbearance. Competition in Anchorage dictates that the Commission should forbear from Sections 251(c)(3) and 252(d)(1).

IV. A Prompt Grant Of Forbearance Is In Order Where Continued Competition Is So Clearly At Stake.

Without forbearance, continued facilities-based competition will be limited to the whim of ACS's competitors. In addition, the ability of ACS to compete will be stymied by regulatory

even the end of December 2007, before a Commission decision was issued, rendering this request moot in light of GCI's migration intentions.

¹⁸ Qwest Forbearance Order, ¶ 75.

¹⁹ *Id.*, ¶ 76.

advantages provided to its facilities-based competitors. These are compelling reasons for the Commission to take prompt action, granting ACS's Petition. There is no reason for the Commission to take the full year allowed it by statute to make this decision. Rather, the Commission should strive to reach a decision on the requested forbearance by June 30, 2006 (nine months from the date that the Petition was filed), which should suffice easily in a clean-cut case such as the one at hand. In no event should the Commission extend the timeframe in which it is permitted to act to 15 months.

CONCLUSION

It was not the intention of Congress when it enacted the unbundling and related pricing obligations of the 1996 Act to shift the competitive balance so as to provide new entrants with a competitive advantage over incumbent carriers. Rather, these regulations were intended to spur competitive markets. Now that competition is firmly entrenched in Anchorage, it is time for the Commission to make good on the other promise of the 1996 Act – deregulation, or more specifically what is at issue in the ACS Petition . . . the elimination of Sections 251(c)(3) and 252(d)(1) obligations.²⁰

Consumers in the Anchorage communications market have access to innovative and competitive services. In other words, they have choices, including facilities-based choices, and they have exercised the options presented by such choices. These choices are a direct result of a market that is fully competitive. Accordingly, it is time for the Commission to eliminate the

²⁰ The Commission noted in the Qwest Forbearance Order that it had earlier found that “it might one day be appropriate to conclude, based upon sufficient facilities-based competition, particularly from cable companies, that the state of local exchange competition might justify forbearance from UNE obligations.” *See* Qwest Forbearance Order, ¶ 63. In considering the state of competition in the Omaha MSA, the Commission determined in the Qwest Forbearance Order that “that expectation is realized.” *See id.* So too should the Commission find that that expectation has been realized in the Anchorage study area.

unnecessary unbundling and related pricing regulations applied to ACS in the Anchorage local exchange study area. These regulations have no business governing a competitive market such as that in Anchorage or in hindering technological developments, innovation, and the fulfillment of the promises made in the 1996 Act to consumers. The forbearance requested is in the public interest. For the foregoing reasons, USTelecom urges the Commission to grant ACS's Petition for Forbearance and to do so in an expeditious manner.

Respectfully submitted,

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January 9, 2006

CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on January 9, 2006, the aforementioned Comments of The United States Telecom Association were electronically filed with the Commission through its Electronic Comment Filing System and electronically mailed to the following:

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